85-1376

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1985.

GLASGOW, INC.,

Petitioner,

v.

STEPHEN S. NOETZEL and
MARILYN B. NOETZEL, his wife,

Respondents.

PETITIONER FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF PENNSYLVANIA.

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Philadelphia, Pennsylvania 19103,
Attorney for petitioner.

55P

QUESTIONS PRESENTED.

1. Did the Pennsylvania courts err in concluding that they were powerless to protect a Pennsylvania corporation against invasion of fundamental federal due process rights by the manipulation of procedural rules in West Virginia?

2. Did the Pennsylvania courts err in holding that principles of res judicata barred the Pennsylvania corporation from attacking the violation of procedural due process that occurred in West Virginia?

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TO THE SUPREME COURT OF PENNSYLVANIA.

Glasgow, Inc.* petitions for a writ of certiorari to review a judgment of the Supreme Court of Pennsylvania.

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* Glasgow, Inc. has no parent company or subsidiaries (other than wholly-owned subsidiaries). It has three affiliates: Blue Mountain Construction Company; Gill Quarries, Inc.; and Glasgow Hauling, Inc.

OPINIONS BELOW.

The opinion of the Court of Common Pleas of Montgomery County, Pennsylvania (A1-A6) is reported at 111 Montgomery County Law Reporter 185 (1982). The opinion of the Superior Court of Pennsylvania (A7-A33) is reported at 338 Pa. Super. 458, 487 A.2d 1372 (1985). The action of the Supreme Court of Pennsylvania (A-34), taken without opinion, is not reported.

JURISDICTION.

The order of the Supreme Court of Pennsylvania denying Glasgow's petition for allowance of appeal from the Superior Court of Pennsylvania was dated November 18, 1985 and was entered November 21, 1985.

Glasgow invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED.

Section 1 of the fourteenth amendment to the United States Constitution provides in pertinent part as follows:

> "...nor shall any State deprive any person of life, liberty, or property, without due process of law...."

STATEMENT OF THE CASE.

This case involves outrageous conduct by a West Virginia lawyer who manipulated that state's procedural rules so as to deny a Pennsylvania defendant any opportunity to defend against a meritless personal-injury claim on which the West Virginia lawyer obtained a default judgment for $300,000. The courts in Pennsylvania have, in effect, sanctioned this outrageous conduct by ruling that they were powerless to look behind the West Virginia default judgment to the federal due process violation through which the judgment was obtained and enforced.

The Pennsylvania courts so ruled in refusing relief to petitioner, Glasgow, Inc., from a judgment lodged against Glasgow in the Court of Common Pleas of Montgomery County, Pennsylvania

under the Pennsylvania Uniform Enforcement of Foreign Judgments Act, 42 Pa.C.S. § 4306. The judgment had been obtained by default in West Virginia in the absence of actual notice to Glasgow. Glasgow sought relief from the judgment on the ground that it had been obtained in violation of due process and was therefore not entitled to full faith and credit in Pennsylvania.

The facts of this case are extraordinary. The judgment lodged in Pennsylvania had been obtained by respondents, Stephen S. Noetzel and Marilyn B. Noetzel, his wife, in an action commenced in the Circuit Court of Kanawha County, West Virginia, on June 13, 1979. In that action the Noetzels sought damages for injuries they allegedly suffered in an automobile accident near a West Virginia

job site where Glasgow, a Pennsylvania road-construction contractor, was working on an interstate highway. According to the West Virginia State Police accident report, the accident occurred at approximately 3:49 A.M. on the morning of Sunday, March 11, 1979, during a heavy snowstorm. Stephen Noetzel, who had been drinking and was driving at an unsafe speed through the snowstorm, misjudged a turn and drove his car off the road and over an embankment. His wife was a passenger in the car.

Although substituted service of the complaint in the Noetzels' action was technically effected on Glasgow in West Virginia, Glasgow did not receive actual notice of the complaint and therefore filed no answer. On August 13, 1979, without notice to Glasgow, the Noetzels' lawyer entered a default judgment in

their favor against Glasgow for an unliquidated amount. On March 19, 1980, again without notice to Glasgow, he certified to the court that the action should be listed for a jury trial on the issue of damages. Still without notice to Glasgow, he then took the depositions of two physicians, which constituted the major evidence at an ex parte trial on June 24, 1980. At the trial, of which Glasgow had no notice, the jury assessed damages against Glasgow in a total amount of $300,000, the exact amount sought in the Noetzels' complaint. The court awarded judgment to the Noetzels against Glasgow for $300,000 on June 25, 1980, once more without notice to Glasgow. The failure to give any notice to Glasgow was permitted by the West Virginia Rules of Civil Procedure.

Rule 60(b) of the West Virginia Rules of Civil Procedure provides:

> "On motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment...for the following reasons: (1) Mistake, inadvertence, surprise, excusable neglect, or unavoidable cause; (2) newly discovered evidence...; (3) fraud...; (4) the judgment is void; (5) the judgment has been satisfied [etc.]; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), (3), and (6) not more than eight months after the judgment... was entered...."

Recognizing the absolute bar imposed by Rule 60(b) against opening a default judgment on the ground of mistake after eight months have elapsed, the Noetzels' lawyer deliberately did not take any steps to execute on the Noetzels'

judgment against Glasgow until that eight-month period had run. Two days later, on February 27, 1981, the Noetzels issued a writ of execution to attach payments due Glasgow from the West Virginia Department of Highways. A representative of the West Virginia Department of Highways then advised Glasgow of the attachment. This was Glasgow's first actual notice not only of the outstanding judgment against it but of the action itself.

Glasgow immediately moved to set aside the judgment and to enjoin any payments by the West Virginia Department of Highways to the Noetzels. By order dated April 9, 1981, the Circuit Court of Kanawha County denied Glasgow's motion on the ground that the eight-month time limit for setting aside a default judgment under the West Virginia Rules of Civil Procedure

had expired. The West Virginia Supreme Court of Appeals, the highest court in the state, subsequently denied Glasgow's petition for a writ of prohibition to prevent further execution on the default judgment. Glasgow's attempt to obtain relief in the United States District Court for the Southern District of West Virginia was also unsuccessful.

As a result of the West Virginia courts' refusal to grant Glasgow any relief, the Noetzels were able to proceed with attachment of payments due Glasgow from the West Virginia Department of Highways. By that device, they recovered $218,811.54 in partial satisfaction of their $300,000 judgment.

On December 22, 1981, the Noetzels took judgment against Glasgow

in the Court of Common Pleas of Montgomery County, Pennsylvania pursuant to the Pennsylvania Uniform Enforcement of Foreign Judgments Act, 42 Pa.C.S. § 4306. Glasgow petitioned to set aside that judgment on the ground that the West Virginia judgment was not entitled to full faith and credit because the Noetzels' actions in obtaining and enforcing their default judgment without actual notice to Glasgow had violated Glasgow's rights under the fourteenth amendment to the Constitution of the United States (Defendant's Petition to Strike etc., ¶ 13, filed January 26, 1982).

The court of common pleas denied the petition to open the judgment. The court relied on nothing more than the simple fact that Glasgow had been properly served with the complaint according to the

West Virginia procedures for substituted service. The court ignored the fact that there had never been actual notice and that the Noetzels' attorney, realizing that Glasgow did not know of the commencement of the action, deliberately manipulated the West Virginia procedures to deprive Glasgow of any opportunity, within the time allowed by the West Virginia Rules of Civil Procedure, to have the judgment opened so that Glasgow could defend the case on its merits.

Glasgow appealed the order of the court of common pleas to the Superior Court of Pennsylvania. The statement of questions involved in Glasgow's brief as appellant in that court (p. 2) expressly raised the issue of due process under the fourteenth amendment to the United States Constitution. Glasgow argued that the

court of common pleas had erred in granting full faith and credit to a judgment obtained and enforced in violation of fundamental principles of procedural due process. The Superior Court held that the determination of the West Virginia courts was res judicata with respect to the validity of the judgment entered in the Circuit Court of Kanawha County. The court ignored the fact that the Noetzels' lawyer had concealed the existence of the judgments by deliberately withholding any effort to enforce them until after expiration of the eight-month limitation on seeking relief from a judgment on the ground of mistake.

Glasgow petitioned the Supreme Court of Pennsylvania to allow an appeal from the Superior Court's decision. Glasgow's petition (pp. 2, 9) expressly raised

the federal constitutional issue. The Supreme Court denied the petition.

REASONS FOR GRANTING THE WRIT.

The Pennsylvania courts have sanctioned and enforced a manifest injustice perpetrated on a Pennsylvania corporation by the courts of West Virginia. They have not approved of the result but have in effect proclaimed their impotence to alter it.

Although the facts of this case are unique, the principle at stake is an important one that involves fundamental due process rights. The Pennsylvania courts have disclaimed their power and responsibility to protect the federal due process rights of their citizens when a deprivation of those rights occurs at the hands of a court in another jurisdiction.

Now only this Court can afford Glasgow relief in this case and, in doing so, provide guidance to the lower courts on the scope of these due process rights.

The decision of the Superior Court of Pennsylvania produces a result that is inconsistent with numerous decisions by this Court defining the scope of procedural due process. This Court has defined the components of procedural due process to include (1) reasonable notice and reasonable opportunity to be heard; and (2) notice that creates an awareness in the defendant that its interests are to be adjudicated and allows the opportunity to present answers and objections. Leis v. Flynt, 439 U.S. 438 (1979); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306

(1950). See also Restatement (Second) of Conflict of Laws § 25 (1979).

The Superior Court of Pennsylvania chose to ignore the vice of what occurred in West Virginia on the stated ground that principles of res judicata bar Glasgow from asserting that what occurred was a violation of procedural due process. In doing so, that court missed the point that Glasgow should not be precluded from relying on the constitutional infirmity in the West Virginia courts' allowing the Noetzels deliberately to conceal their default judgment for eight months and then invoke the eight-month time limit against Glasgow's claim of mistake that resulted in its failure to appear and defend. The West Virginia courts' refusal to allow Glasgow to make that claim had not occurred when

Glasgow asked for relief on the ground of mistake, and the federal due process question was, therefore, neither presented nor decided in West Virginia.

The same fallacious reasoning led the Superior Court to assert that Glasgow could have raised its procedural due process claim in West Virginia because the eight-month limit in the West Virginia rules does not apply to a judgment that is void for lack of due process (A20). But the judgment was not void on the state of the record as it was when Glasgow learned of the judgment's existence. Glasgow's ground for seeking relief from the judgment was the mistake that had resulted in Glasgow's failure to appear and defend. It was the West Virginia courts' refusal to allow Glasgow to raise the claim of mistake after the

Noetzels' lawyer had concealed the existence of the judgment for eight months that violated Glasgow's right to due process.

In looking at mere technical compliance with procedural rules and failing to focus on the gross injustice perpetrated by the manipulation of those rules under the circumstances of this case, the Pennsylvania courts ignored the principles established by this Court. Glasgow seeks review by this Court of state action that undermines fundamental rights guaranteed by the Constitution of the United States.

Respectfully submitted,

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February 18, 1986.

A P P E N D I X

THE COURT OF COMMON PLEAS OPINION.

IN THE COURT OF COMMON PLEAS OF
MONTGOMERY COUNTY, PENNSYLVANIA

STEPHEN S. NOETZEL and MARILYN B. NOETZEL, h/w	:	NO. 81-22360
VS.	:	
GLASGOW, INC.	:	FOREIGN JUDGMENT

O P I N I O N

[Entered September 7, 1982]

LOWE, P. J., September 3, 1982

Defendant Glasgow, Incorporated is a Pennsylvania corporation licensed to do business in West Virginia. On June 13, 1979 the plaintiffs, residents of West Virginia, commenced personal injury litigation against the defendant in their home state.

Pursuant to the West Virginia Rules of Civil Procedure,[1] a summons and complaint were served upon the West Virginia Secretary of State. He, in turn, forwarded to the defendant a copy of the Complaint and set forth the time in which to file an Answer or appearance.

Defendant, through inadvertence, failed to file an Answer or enter an appearance. Subsequently, a default judgment on the issue of liability was entered on August 13, 1979. The issue of damages was reserved, and a jury trial convened June 25, 1980. The jury awarded damages in the amounts of One Hundred Thousand ($100,000) Dollars to Stephen S. Noetzel, and Two Hundred Thousand ($200,000) Dollars to Marilyn B. Noetzel.

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1. West Virginia Code 31-1-15.

On February 27, 1981 plaintiffs commenced execution proceedings against defendant in West Virginia. The plaintiffs, having recovered approximately $218,000 of their $300,000 awards, filed the judgment in Montgomery County pursuant to the Pennsylvania Uniform Enforcement of Foreign Judgments Act[2] seeking satisfaction.

Glasgow, Inc. then filed in this Court a Petition to Strike and/or Open and/or Vacate the West Virginia judgments. That Petition was denied by the undersigned on August 11, 1982. The defendant has appealed, thus necessitating this Opinion.

Defendant contends the West Virginia judgment is not entitled to full faith and credit because there exists a

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2. 42. Pa. C.S.A. 4306.

lack of due process in that state's courts. Specifically, the defendant alleges that because there are no provisions for notice of intention to take a default judgment following the service of the Complaint, the West Virginia Rules of Civil Procedure are unconstitutional.

Due process is governed by the Fourteenth Amendment to the United States Constitution and, inter alia, mandates a reasonable method of notifying defendants of proceedings against them. A judgment rendered without meeting this requirement is void, both under constitutional law and the Pennsylvania Uniform Enforcement of Foreign Judgments Act. Sniadach vs. Family Finance Corporation, 395 U.S. 337 (1969), Everson vs. Everson, 264 Pa. Superior Ct. 563 (1979).

The level of procedural due process that is minimally required is 1) reasonable notice and reasonable opportunity to be heard; 2) notice that creates an awareness in the defendant that its interests are to be adjudicated and allows the opportunity to present answers and objections. See Leis vs. Flynn, 439 U.S. 438 (1979); Sniadach vs. Family Finance Corporation, supra; Mullane vs. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950), Restatement (Second) of Conflict of Laws, § 25, Comment 6 (1971). Some states may impose more demanding requirements in this regard, as does Pennsylvania, but the fact that West Virginia is not so stringent is not fatal to the judgment.

There can be no dispute that the defendant was properly served with the

Complaint. The defendant acknowledges that it did not plead or otherwise defend in a timely manner. Thus, it was as a result of the defendant's omissions that a default judgment was entered. Therefore, the defendant's contention that it was not afforded a constitutionally sufficient notice is erroneous. Procedural due process is a concept which protects basic rights. Clearly, that was done in the instant case. Due process does not create new rights and will not serve to elevate defendant's omissions into a constitutionally protected sphere.

Therefore, upon consideration of the record and the briefs and arguments of counsel, the Order of August 11, 1982 should be affirmed.

BY THE COURT:

/s/ Richard S. Lowe
P. J.

THE SUPERIOR COURT OPINION.

STEPHEN S. NOETZEL and MARILYN B. NOETZEL, his wife,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellees	:	
vs.	:	
GLASGOW, INC.,	:	
Appellant	:	No. 2421 Philadelphia, 1982

Appeal from Order of the Court of Common Pleas, Civil Division, of Montgomery County, No. 81-22360.

Before BROSKY, WIEAND and McEWEN, JJ.

WIEAND, Judge [Entered January 30, 1985]:

This is an appeal from an order denying a petition to strike/open a judgment for $300,000 which was recovered in West Virginia and transferred to Montgomery County, Pennsylvania, pursuant to

the Uniform Enforcement of Foreign Judgments Act.[1] Appellant contends that the West Virginia judgment is not entitled to full faith and credit in Pennsylvania because it was obtained in violation of due process requirements. We disagree and, therefore, affirm the order refusing to strike the judgment. However, we will direct that the judgment be amended to reflect partial satisfaction effected by payments admittedly received in West Virginia.

Stephen and Marilyn Noetzel, husband and wife, brought suit in the Circuit Court of Kanawha County, West Virginia, to recover for personal injuries sustained in an automobile accident on Interstate Route 79 in Kanawha County.

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1. 42 Pa.C.S. § 4306.

Named as defendant was Glasgow, Inc., a Pennsylvania corporation, which had contracted with the West Virginia Department of Highways to perform road work. It was alleged in the Noetzel complaint that Glasgow had negligently erected "Detour" barriers, without proper warning signs, thus causing the Noetzel vehicle to crash. Service of the complaint was effected on June 18, 1979 by making service on the Secretary of State of West Virginia who, pursuant to W.Va.Code § 31-1-15, had been designated attorney-in-fact for foreign corporations. The Secretary of State mailed the complaint to Glasgow's West Virginia agent, C. T. Corporation System, in Charleston, West Virginia. It was there received by W. M. Woodroe, who forwarded it to the C. T. Corporation in Philadelphia. Finally, it was transmitted

to the offices of Glasgow's general counsel. By inadvertence and mistake thereafter occurring, the complaint was not answered; and, on August 13, 1979, a default judgment was entered without further notice to Glasgow. On March 19, 1980, the action was certified for jury trial to determine damages. Again, no notice was given to Glasgow, and the trial to assess damages proceeded ex parte on June 25, 1980. The verdict awarded damages to Stephen Noetzel in the amount of $100,000 and to Marilyn Noetzel in the amount of $200,000.

On February 27, 1981, the Noetzels issued a writ of execution and garnished moneys payable to Glasgow by the West Virginia Department of Highways. Glasgow then learned of the judgment which had been entered against it for the first

time and moved, on March 23, 1981, for relief from the judgment. Its request was denied by the West Virginia court on April 9, 1981. The court held that service had been lawful, that Glasgow had been entitled to no further notice after it had failed to enter an appearance, and that Glasgow had failed to prove fraud in obtaining the judgment. Moreover, the Court held, the averments of Glasgow's motion that default had occurred as a result of inadvertence, mistake, surprise or fraud "were not made within eight (8) months of the entry of the judgment order herein and therefore [pursuant to W.Va.R. Civ.P. 60(b)] cannot be considered as grounds to set aside the...order." No appeal was taken from that order. However, on May 22, 1981, Glasgow filed a petition for writ of prohibition in the Supreme

Court of Appeals of West Virginia seeking to prohibit further proceedings on the judgment. Relief was denied on June 2, 1981. An attempt to obtain relief in the United States District Court for the Southern District of West Virginia was also unsuccessful. See: Glasgow, Inc. v. Noetzel, 556 F.Supp. 595 (S.D.W.Va. 1983).

As a result of attachment execution issued against the Department of Highways in West Virginia, the Noetzels were able to collect $218,811.54 on account of their judgment. Then, on December 22, 1981, they filed in the Court of Common Pleas of Montgomery County, Pennsylvania, a praecipe for judgment "in the amount of [$300,000] in favor of [p]laintiffs, Stephen S. Noetzel and Marilyn B.

Noetzel pursuant to the Uniform Enforcement of Foreign Judgments Act." The Court of Common Pleas denied a motion to open/strike the judgment thus recorded in Montgomery County, and Glasgow appealed. It contends that "the Noetzels manipulated the procedural rules [in West Virginia] in a manner that deprived Glasgow of its due process rights to notice and an opportunity to be heard" and that "Rule 60(b) of the West Virginia Rules of Civil Procedure is unconstitutional because it provides an absolute bar to relief from judgments entered without notice or hearing by plaintiffs who deliberately conceal the judgments until the limited time for seeking relief ha[s] expired." Because its due process rights were violated, Glasgow contends, the judgment against it is not entitled to full faith and credit and

therefore is not entitled to be accepted or enforced in Pennsylvania pursuant to the Uniform Enforcement of Foreign Judgments Act.

The Uniform Enforcement of Foreign Judgments Act provides:

> (b) Filing and status of foreign judgments.--A copy of any foreign judgment including the docket entries incidental thereto authenticated in accordance with act of Congress or this title may be filed in the office of the clerk of any court of common pleas of this Commonwealth. The clerk shall treat the foreign judgment in the same manner as a judgment of any court of common pleas of this Commonwealth. A judgment so filed shall be a lien as of the date of filing and shall have the same effect and be subject to the same procedures, defenses and proceedings for reopening, vacating, or staying as a judgment of any court of common pleas of this Commonwealth and may be enforced or satisfied in like manner.

42 Pa.C.S. § 4306(b). A "foreign judgment" is defined in the Act as "any judgment, decree, or order of a court of the United States or of any other court requiring the payment of money which is entitled to full faith and credit in this Commonwealth." 42 Pa.C.S. § 4306(f).

A foreign judgment is entitled to full faith and credit in Pennsylvania so long as "there was jurisdiction by the court which originally awarded the judgment, see Stambaugh v. Stambaugh, 458 Pa. 147, 329 A.2d 483 (1974), and the defendant had an opportunity to appear and defend, see Morris Lapidus Associates v. Airportels, Inc., 240 Pa.Super. 80, 361 A.2d 660 (1976)." Everson v. Everson, 494 Pa. 348, 361, 431 A.2d 889, 895-896 (1981). The courts in Pennsylvania will refuse to give full faith and credit to a

foreign judgment if it was obtained in derogation of a basic, due process right of the defendant. Hanson v. Denckla, 357 U.S. 235, 255, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283, 1298 (1958). However, when "the court of another state has purported to act on the merits of a case, its jurisdiction to do so and the regularity of its proceedings are presumptively valid." Barnes v. Buck, 464 Pa. 357, 364, 346 A.2d 778, 782 (1975). The party challenging the validity of the judgment, therefore, bears the burden of showing any irregularity in the proceedings. Commonwealth, Department of Transportation v. Granito, 7 Pa.Cmwlth. 123, 127, 452 A.2d 889, 891 (1982).

The first problem which appellant encounters is that a prior request for relief from the default judgment was

made to the court in West Virginia and was denied. The West Virginia court, which clearly had jurisdiction to determine the integrity of its own judgment, upheld the finality of appellees' judgment against appellant in the face of a petition by appellant which challenged its validity. In denying appellant's request for relief, the court found that the judgment had not been fraudulently obtained and that there was neither factual nor legal basis for relief. This determination of the West Virginia court, from which no appeal was taker, is res judicata with respect to the validity of the judgment. When a court of competent jurisdiction has determined a litigated cause on its merits, the judgment entered and not reversed on appeal is, forever and under all circumstances, final and conclusive

as between the parties to the suit and their privies, in respect to every fact which might properly be considered in reaching a judicial determination of the controversy, and in respect to all points of law there adjudged, as those points relate directly to the cause of action in litigation. Bearoff v. Bearoff Bros., Inc., 458 Pa. 494, 498, 327 A.2d 72, 74 (1974); Stevenson v. Silverman, 417 Pa. 187, 191, 208 A.2d 786, 787-788, cert. denied, 382 U.S. 833, 86 S.Ct. 76, 15 L.Ed.2d 76 (1965). A final, valid, judicial determination on the merits by a court of competent jurisdiction bars any future litigation between the same parties on the same cause of action. Id., 417 Pa. at 190, 208, A.2d at 787; Goldstein v. Ahrens, 379 Pa. 330, 108 A.2d 693 (1954).

It bars relitigation of issues raised, as well as arguments which might have been raised. General Accident Fire & Life Assurance Corp. v. Flamini, 299 Pa.Super. 312, 316, 445 A.2d 770, 772 (1982). This doctrine of res judicate is a part of the "national jurisprudence" by virtue of the full faith and credit clause of the federal constitution. Riley v. New York Trust Co., 315 U.S. 343, 349, 62 S.Ct. 608, 612, 86 L.Ed. 885, 891 (1942). It follows that appellant is precluded from attacking the validity of the West Virginia judgment a second time in the courts of Pennsylvania. Indeed, it was in part because of principles of res judicata that the federal court refused to consider appellant's request for relief in that court. Glasgow, Inc. v. Noetzel, supra.

Appellant contends that because of the eight month statute of limitations provided in West Virginia Rule 60(b), infra, it was foreclosed from arguing the merits of its claim that the judgment was invalid because of the unconstitutionality of West Virginia's procedural rules. There is no merit in this contention. Rule 60(b)'s eight month limitation period applies only to attacks on the judgment for reasons of mistake, inadvertence, surprise, fraud and things of that nature. A judgment debtor is not precluded by the limitation period from attacking a judgment which is void. W.Va.R.Civ.P. 60(b)(4). "Embraced within the ambit of Rule 60(b)(4) are those judgments which are void by reason of a lack of due process. Glasgow could thus have raised its constitutional claim in the

courts of West Virginia when it sought relief from the default judgment there." Glasgow, Inc. v. Noetzel, supra at 599 (citation omitted). Appellant is barred by principles of res judicata from raising this claim not only in the federal courts but also in the courts of Pennsylvania.

Appellant's challenge to the monetary judgment on due process grounds is also lacking in substantive merit. That the courts of West Virginia had in personam jurisdiction over appellant is clear. Appellant was properly served with a copy of the initial complaint, and notice of appellees' action was received. Although conceding the court's in personam jurisdiction, appellant argues that due process was violated by West Virginia procedure which permitted the entry of a

default judgment and a hearing to determine damages without additional notice and an opportunity to be heard. This procedure when coupled with an eight months' limitation on the right to petition to open the default judgment, Glasgow contends, was offensive to due process.

W.Va.R.Civ.P. 5(a) provides, in part, as follows:

> No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

W.Va.R.Civ.P. 60(b) provides, in part, as follows:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

> (1) Mistake, inadvertence, surprise, excusable neglect, or unavoidable cause; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), (3) and (6) not more than eight months after the judgment, order, or proceeding was entered or taken.

(Emphasis added). Appellees waited until more than seven months had elapsed following the entry of the default judgment. They then asked for a hearing to determine the amount of damages sustained in order

to give monetary significance to their judgment. This hearing was held more than eight months after the entry of default judgment and without notice to Glasgow, pursuant to W.Va.R.Civ.P. 5(a). We are not called upon to review the wisdom of procedural rules which permit such a result.[2] We must determine only whether the procedure established by rule in West Virginia violated rudimentary principles of due process. See: Everson v. Everson, 264 Pa.Super. 563, 574, 400 A.2d 887, 893 (1979), aff'd as modified, 494 Pa. 348, 431 A.2d 889 (1981).

Notice, the most basic requirement of due process, must "be reasonably calculated to inform interested parties

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2. A similar result could not occur in Pennsylvania. See: Pa.R.C.P. 236, 237.1.

of the pending action, and the information necessary to provide an opportunity to present objections. The form of the notice required depends on what is reasonable, considering the interests at stake and the burdens of providing notice." Pennsylvania Coal Mining Association v. Insurance Department, 471 Pa. 437, 452-453, 370 A.2d 685, 692-693 (1977). See also: Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 314-315, 70 S.Ct. 652, 657, 94 L.Ed. 865, 873 (1950); Stateside Machinery Co. v. Alperin, 591 F.2d 234, 241 (3d Cir. 1979); Celane v. Commonwealth, Insurance Commissioner, 51 Pa. Cmwlth. 633, 635, 415 A.2d 130, 132 (1980). As long as a method of service is reasonably certain to give notice to a defendant that an action is pending against him, the fact that such defendant

fails to receive actual notice does not invalidate service on due process grounds. Stateside Machinery Co. v. Alperin, supra at 241. The substituted service on the West Virginia Secretary of State in this case and his subsequent notification of Glasgow's West Virginia agent was in fact reasonably calculated to inform Glasgow of the action and was adequate to satisfy due process requirements. Moreover, the notice in this case was received in fact by Glasgow's representatives. The failure to act in pursuance thereof was attributable either to inadvertence or carelessness. Due process did not require that Glasgow received repeated notices thereafter. When Glasgow failed to appear in response to initial service, due process did not require that it again be invited to participate in the proceedings. Appellees

were not required to obtain Glasgow's permission to proceed further. Due process did not require notice of appellees' intent to enter a default judgment or of their intent to take procedural steps to reduce their judgment to a monetary amount. When Glasgow failed to evidence interest in defending the action following service of initial process, due process did not require that appellees invite them to join the proceedings thereafter. See: Federal Deposit Insurance Corp. v. Spartan Mining Co., 96 F.R.D. 677 (S.D.W.Va. 1983). See also: Anderson v. Taylorcraft, Inc., 197 F.Supp. 872, 873 (W.D. Pa. 1961) (in absence of appearance defendant was not entitled to notice of nonjury trial).

Similarly, we are unable to perceive constitutional infirmity in Rule

60(b) which, in effect, imposes an eight months' limitation on motions to open default judgments where the default was caused by "mistake, inadvertence, surprise, excusable neglect or unavoidable cause." Subject only to the requirement that the limitation must be reasonable, statutes of limitation pertain to remedies and do not impair fundamental rights. Gravinese v. Johns Manville Corp., 324 Pa. Super. 432, 441, 471 A.2d 1233, 1238 (1984). The West Virginia rule is reasonable.[3] It has a rational and valid

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3. The courts of Pennsylvania have uniformly refused to open default judgments unless a petition to open is filed promptly. See: Ridgid Fire Sprinkler Service, Inc. v. Chaiken, 333 Pa.Super. 213, 218, 482 A.2d 249, 252 (1984); Dodson v. N. John Cunzolo & Associates Architectural Clay Products, Inc., 326 Pa.Super. 283, 288-289, 473 A.2d 1093, 1096 (1984); Bottero v. Great Atlantic & Pacific Tea Co., 316 Pa.Super. 62, 68-70, 462 A.2d 793, 797-798 (1983).

purpose. It provides for the finality of judgments entered by default after a reasonable time for seeking relief has expired. The establishment of a fixed period of limitation was properly a matter within the discretion of the courts of West Virginia. We will not review possible imperfections in this West Virginia procedure. We determine only whether the imperfections are so egregious as to offend due process. We conclude that they are not. The fact that appellees relied upon the West Virginia rule to establish the finality of their judgment and thereafter established the monetary amount of their judgment and pursued execution thereon did not render the period of limitations unreasonable or invalid. If appellees used the rule for their own

purposes, it was appellant's default which made it possible for them to do so.

We conclude, therefore, that the Court of Common Pleas in Montgomery County properly denied appellant's motion to strike the judgment transferred from West Virginia. That judgment was not offensive to due process and was thus entitled to full faith and credit in Pennsylvania. It can properly be enforced by the courts of this Commonwealth pursuant to the Uniform Act.

It is clear, however, that the amount of appellees' judgment is incorrect because of partial satisfaction effected in West Virginia.[4] Appellant's petition

---

4. Appellant has argued that the Pennsylvania judgment should be stricken because it combined separate

(Footnote continued on next page)

to open or strike the judgment averred that the sum of $218,811.54 had been realized by garnishment proceedings in West Virginia, and appellees' answer contained an admission that this was correct.

"A judgment should only be stricken if the record reveals a defect on its face....[5] The fact that the judgment was entered was not the mistake and

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(Footnote continued from previous page)

judgments entered in West Virginia in favor of husband and wife. We have rejected this argument. The Pennsylvania judgment is clearly supported by the record in West Virginia, and it is not rendered defective because both judgments were consolidated in a joint proceeding in this state.

5. Appellees' counsel properly certified that the West Virginia judgment remained "unsatisfied." The failure of the certification to reflect a "partial satisfaction" in the amount collected in West Virginia did not render the Pennsylvania judgment susceptible to a motion to strike. Cf. Busy Beaver Building Centers, Inc. v. Tueche, 295 Pa.Super. 504, 442 A.2d 252 (1981).

and thus the entire judgment should not be stricken." B.C.Y., Inc. Equipment Leasing Associates v. Bukovich, 257 Pa. Super. 121, 125, 390 A.2d 276, 278 (1978) (footnote added). However, a court has an inherent power to correct the amount of a judgment and may do so on its own motion. Wilson Laundry Co. v. Joos, 200 Pa. Super. 595, 601, 189 A.2d 917, 920 (1963). Under the circumstances of this case, we will remand to the trial court to enter an order amending the judgment to reflect the partial satisfaction effected in West Virginia.

Remanded with directions to amend the judgment by reducing it according to the partial satisfaction admittedly effected in West Virginia. The order refusing to strike or open the judgment is

otherwise affirmed. Jurisdiction is not retained.

THE SUPREME COURT ORDER.

[Letterhead of the Prothonotary of the Supreme Court of Pennsylvania.]

November 21, 1985

Edward W. Mullinix, Esquire
Suite 3600, 1600 Market Street
Philadelphia, PA 19103

Re: STEPHEN S. NOETZEL and MARILYN B. NOETZEL, his wife v. GLASGOW, INC., Petitioner
No. 386 E.D. Allocatur Docket 1985

Dear Mr. Mullinix:

This is to advise you that the following Order has been endorsed on your Petition for Allowance of Appeal, filed in the above captioned matter:

"November 18, 1985.
Petition Denied.
Per Curiam."

Very truly yours,

/s/ Patrick Tassos
PATRICK TASSOS
Deputy Prothonotary

/pj
cc: J. Michael Sheridan, Esquire

Supreme Court, U.S.
FILED
MAR 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1376

In the

SUPREME COURT OF THE UNITED STATES

October Term 1985

GLASGOW, INC.,

Petitioner,

v.

STEPHEN S. NOETZEL and
MARILYN B. NOETZEL, his wife,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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(304) 343-7676
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Of Counsel

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether or not the judgment rendered in West Virginia was in violation of federal due process rights?

2. Whether or not the question of a possible violation of federal due process rights was decided by other courts in a manner to preclude examination by Pennsylvania courts based upon principles of res judicata?

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No. 85-1376

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

COUNTER-STATEMENT OF JUDGMENT BELOW

In addition to opinions

noted by petitioner, respondent would call the Court's attention to the judgment rendered by the United States District Court for the Southern District of West Virginia: Glasgow, Inc. v. Noetzel, 556 F. Supp. 595 (1983); the judgment of the Circuit Court of Kanawha County, West Virginia, which is unreported but reproduced as Appendix A at pages A1 - A8; and the action of the West Virginia Supreme Court of Appeals which is unreported but reproduced as Appendix B at pages A9 - A10.

COUNTER-STATEMENT OF CONSTITUTIONAL, STATUTORY OR REGULATORY PROVISIONS INVOLVED

In addition to the constitutional provision noted by petitioner there is involved the provision of United States Constitution Article 4, Section

1, which provides: "Full faith and credit shall be given in each state to the . . . judicial proceedings of every other state." Also involved is the constitutionality of West Virginia Rules of Civil Procedure Rule 5(a) (See Appendix C pp. A11 - A12) and Rule 60(b) (See Appendix D pp. A13 - A 15). Indirectly, the constitutionality of Rule 5 of the Federal Rules of Civil Procedure, identical to the West Virginia rule, is questioned.

COUNTER-STATEMENT OF THE CASE

On June 11, 1979, a tort action was instituted by Stephen S. Noetzel and Marilyn B. Notzel, his wife, (respondents, hereinafter "Noetzels") against Glasgow, Inc. (petitioner,

hereinafter "Glasgow") in the Circuit Court of Kanawha County, West Virginia. On June 18, 1979, a summons and complaint was served on the Secretary of State of West Virginia as statutory attorney-in-fact for Glasgow. On the same day this process was sent to and actually received by an agent designated by Glasgow for such purpose. In a timely fashion Glasgow's designated agent sent the process of the Circuit Court of Kanawha County to another agent of Glasgow, its counsel, which process was actually received. Included in the process of the Circuit Court of Kanawha County, actually received by Glasgow through its agents, was a statement that Glasgow had a specified period of time within which to answer and defend or that judgment

by default would be entered against Glasgow. Glasgow did not enter an appearance, answer or defend and judgment pursuant to a jury trial was rendered against it by the Circuit Court of Kanawha County on June 25, 1980. Pursuant to Rule 5 (a) of the West Virginia Rules of Civil Procedure, identical in pertinent language to Rule 5 of the Federal Rules of Civil Procedure, the only notice that was given to Glasgow of various events in the judgment procedure was the original notice actually received by Glasgow. Glasgow's assertion in its statement of the Case that it did not receive actual notice is false.

After commencement of collection activities by Noetzels more than eight months after entry of judgment, Glasgow

moved in the original action to set aside the judgment upon grounds under Rule 60(b) of the West Virginia Rules of Civil Procedure. No federal due process question was raised. The Circuit Court of Kanawha County ruled, among other things, that Glasgow had actually received proper notice of the proceedings; that no factual or legal basis existed for relief from the judgment; and that, in any event, allegations of mistake, inadvertance, surprise or fraud had not been timely made under provisions of Rule 60(b) of the West Virginia Rules of Civil Procedure which requires such to be asserted within eight months (Appendix D, pp. A13 - A15). This judgment was never appealed and the time within which to appeal has expired.

At about the same time Glasgow petitioned the Supreme Court of Appeals of West Virginia for a writ of prohibition setting aside the judgment and prohibiting collection activities. The West Virginia Supreme Court declined to award the writ (Appendix B, pp. A9 - A10). This decision was not appealed nor was there taken a petition for a writ of certiorari to this Court. The time within which to do so has expired.

Also at about the same time, and more importantly, Glasgow filed an action in the United States District Court for the Southern District of West Virginia, asserting, among other things, that it had been deprived of federal due process rights. The United States District Court ruled that, among other things, proper original process had been actually

received; that Glasgow was not entitled to additional notice; that federal due process had been satisifed; and that the state court action on the Rule 60(b) motion was res judicata in any event. This judgment was not appealed and the time within which to do so has expired.

Noetzels collected a portion of their judgment in West Virginia and then sought to collect the balance in Pennsylvania under the Full Faith and Credit clause of the United States Constitution. Glasgow resisted these activities and sought to litigate the merits of the underlying cause as well as again raising federal due process contentions. The Superior Court of Pennsylvania, affirmed by refusal to review by the Supreme Court of Pennsylvania, held that Glasgow had been afforded federal due process and that, in

any event, principles of res judicata based on the United States District Court's decision as well as decisions rendered by state courts in West Virginia precluded review of these already decided issues. It is to this decision that the petition for writ of certiorari is taken.

Petitioner's Statement of the Case contains many assertions concerning the underlying West Virginia's judgement which are totally unsupported by the record or any decision below and with which respondents disagree. Those factual matters, however, are not properly in issue in this proceeding.

SUMMARY OF REASONS WHY WRIT SHOULD NOT BE GRANTED

Respondents argue that the original

judgment obtained in West Virginia was based on due process satisfying notice and is entitled to full, faith and credit in Pennsylvania.

Respondents further argue that there exists no due process deficiency in the applicable West Virginia Rules of Civil Procedure.

Respondents further argue that all of the issues advanced by petitioner have already been litigated to a finality in state and federal courts in West Virginia and are not subject to review by the Pennsylvania courts or this Court because of principles of res judicata.

REASONS WHY WRIT SHOULD NOT BE GRANTED

The fundamental question addressed by the Pennsylvania Courts was whether or

not the West Virginia judgment obtained by the Noetzels against Glasgow was entitled to full faith and credit in Pennsylvania under Article 4, Section 1 of the United States Constitution.

Glasgow argues that full faith and credit should not be afforded because of some deprivation of due process in West Virginia. No contention has ever been made that the West Virginia court lacked jurisdiction of the subject matter of the litigation. Glasgow apparently claims that it was deprived of due process by virtue of receiving inadequate notice of the West Virginia proceeding. Despite the assertion by Glasgow that it did not recieve actual notice, it admits that original process was actually received by the West Virginia Secretary of

State, its statutory agent, and by an individual appointed by Glasgow to receive such process from the Secretary of State who, in turn, sent it to Glasgow's attorney who actually received it. Glasgow does not explain how actual receipt by its agents appointed for that purpose does not constitute actual receipt by the corporation. The very nature of corporations dictates that actual receipt of anything must be through a human agent.

Glasgow further argues that it was deprived of notice of subsequent events in the West Virginia litigation. However, Rule 5(a) of the West Virginia Rules of Civil Procedure, identical to the federal rule, provides that no notice need be given to parties

in default. (Appendix C, p. All). This does not violate due process because Glasgow received the original process which provided adequate general notice of the proceedings.

Glasgow then asserts that it was deprived of due process by virtue of the provisions of Rule 60(b) of the West Virginia Rules of Civil Procedure which limits the time within which a default judgment can be set aside for grounds such as mistake or inadvertence to eight months from the date of judgment. This time limitation does not apply to void judgments, such as those which may be void for lack of due process. The West Virginia Rules of Civil Procedure are patterned after the federal rules. Prior to the adoption of the Federal Rules of Civil

Rules of Civil Procedure, relief from a judgment could be obtained only during the term of court in which the judgment was entered, which procedure produced unequal time periods depending on when during the term the judgment was entered. The original Rule 60(b) of the Federal Rules of Civil Procedure limited a request for relief from a judgment for grounds such as mistake or inadvertence to six months. 7 Moore's Federal Practice, §60.09. This period was extended to one year by amendment to the federal rules in 1946. Glasgow does not argue that the eight month period is unreasonable because of the length of the period but seems to argue that the existence of any time period is violative of due process. No cogent argument can be made to support such a contention,

particularly in view of the history of such remedial procedures and similar limitations in federal jurisprudence.

Glasgow contends that the Pennsylvania courts erred in concluding that principles of res judicata precluded re-litigation of issues of due process. The West Virginia trial court, in response to a Rule 60(b) motion made by Glasgow, ruled that there was no deficiency in service of original process on Glasgow; that its agent actually received the original process; that by virtue of its failure to appear it was not entitled to further notice; that Glasgow had failed to support its claim of fraud or mistake; and that Glasgow had generally asserted no factual or legal basis for relief. (See Appendix A pp. A2 - A8). This

ruling was never appealed and is now final. Glasgow then sought a writ of prohibition from the Supreme Court of Appeals of West Virginia, which was denied (See Appendix B, pp. A9 - A10). This likewise was never appealed and is final. Finally Glasgow collaterally attacked the judgment in the United States District Court for the Southern District of West Virginia which held that Glasgow raised or could have raised all of the due process questions in the trial court and that principles of res judicata precluded re-litigation of the same issues. Glasgow, Inc. v. Noetzel, 556 F. Supp. 595 (1983). This ruling was not appealed and is now final. Thus not only have these parties already litigated to a finality all of Glasgow's contentions but have already

litigated to a finality the question of the proper application of principles of res judicata.

It is fundamental that issues once litigated to a finality between the same parties cannot again be litigated in a subsequent action. Partman Corp. v. Parmount Pictures Threatres Corp., 347 U.S. 89 (1954). Further this includes not only issues that were raised but issues that could have been raised. In Re: Estate of Nichols, 144 W.Va. 116, 107 SE2d 53 (1959).

Glasgow in its petition has simply not advanced any sensible argument for review by this Court of issues which have already been litigated to a finality and which had no merit in the first place. The Pennsylvania courts have been plainly right. Durfee v.

Duke, 375 U.S. 106 (1963), Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982).

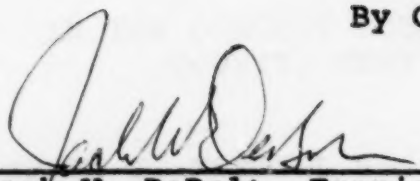
CONCLUSION

Respondents submit that petitoner has failed to state any supportable reason for review by this Court. Neither has petitioner cited any authority to support its claims. Respondents accordingly request that this Court deny the petition. Because petitioner's argument is so clearly without merit as to be frivolous, respondents would also respectfully request this Court to award respondents damages pursuant to Supreme Court Rule 49.2.

Respectfully submitted,

Stephen S. Noetzel and
Marilyn B. Noetzel,

By Counsel



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APPENDIX A

IN THE CIRCUIT COURT OF KANAWHA
COUNTY, WEST VIRGINIA

STEPHEN S. NOETZEL and
MARILYN B. NOETZEL

vs.

GLASGOW, INC., a
corporation

On March 23, 1981 came the plaintiffs by their counsel, Jack W. DeBolt and Timothy N. Barber, and also came the defendant by its counsel, Elmer H. Dodson and Stanley E. Deutsch, pursuant to an oral notice of defendant's motion for preliminary injunction herein and defendant's motion for relief from judgment order given by counsel for defendant to counsel for plaintiffs approximately one

(1) hour before hearing, and as an accommodation to the Court. Whereupon the Court heard the arguments and affirmation of respective counsel on the issues arising in each motion. Upon the pleadings, affidavit, affirmations and arguments the court found the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The allegations in defendant's motion for preliminary injunction coupled with the affirmations of counsel for defendant thereon as well as the verified motion for relief from judgement order provide no factual basis for the determination that defendants would suffer any irreparable damage or any other basis for the issuance of a preliminary injunction.

2. Defendant admits, and does not deny, that service of the original process in this action was accomplished properly and lawfully by service upon the Secretary of State of West Virginia, and, further that said process was duly, lawfully and properly forwarded to and received by a qualified agent of defendant.

3. Defendant never appeared in this cause of action either specially, generally, formally or informally.

4. The claim and cause of action set forth in the Complaint herein was not changed or altered in any subsequent motions or pleadings herein.

5. Following service of the original process herein no notice of the trial date held herein, any motions, notices for the taking of depositions,

discovery or other motions as well as executions, suggestions and post-judgement ancillary process were served upon defendant.

6. After the verdict of the jury hereinassessing the amounts of damage in favor of the plaintiffs against defendant (June 23, 1980) and the entry of the judgement order reflecting said verdict (June 25, 1980) a period of more than eight (8) months elapsed before either (a) any executions, suggestions, suggestee execution, fieri facias or other ancillary process was issued or returned herein, and/or (b) the filing of defendant's motion for preliminary injunction and/or its motion for relief from judgement order.

7. No specificity was offered by defendant to explain the allegations of

fraud either by plaintiffs or their counsel in the motion for relief from judgement order and, further, no request or motion was made to amend said motion to provide any specificity to said allegations of fraud.

CONCLUSIONS OF LAW

1. None of the pleadings, affidavits, affirmations and arguments of counsel separately or cumulatively provide a basis for issuance of a preliminary injunction as requested by defendant.

2. There was no deficiency in the service of original process upon the defendant.

3. Defendant by its proper agent actually received the original process

herein.

4. By virtue of the failure of defendant to appear herein after service of the original process, it was not entitled to be served with any further notices, pleadings, motions or any other documents attendant or incidental to this cause of action.

5. The allegations of fraud in defendant's motion are not stated with particularity and therefore are improper of [sic] their face and are not subject to consideration. Further no offer of proof, affidavit, argument or affirmations of counsel support any claim of fraud by either plaintiffs or their counsel.

6. The allegations of mistake in defendant's motion are not stated with particularity and therefore are improper

on their face and are not subject to considertion.

7. The allegations in defendant's motion asserting mistake, inadvertance, surprise or fraud were not made within eight (8) months of the entry of the judgement order herein and therefore cannot be considered as grounds to set adide the said judgement order.

8. Defendant has provided no factual or legal basis to substantiate a claim for any relief including that requested in its motion for a preliminary injunction and/or its motion for relief from judgement order.

It is therefore ORDERED that defendant's motion for preliminary injunction and defendant's motion for relief from judgement order are denied,

to all of which defendant objects and excepts. All of which is ordered nunc pro tunc as of March 23, 1981.

ENTER:

/s/ Patrick Casey

Judge

Date: 4/9/81

APPENDIX B

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 2nd day of June, 1981, the following order was made and entered, to-wit:

Glasgow, Inc.

vs. Prohibition

The Honorable Patrick Casey, Judge, etc.

On a former day, to-wit, May 22, 1981, came the petitioner, Glasgow, Inc., by Steptoe & Johnson, Herbert G. Underwood and Irene Keeley, Dodson, Deutsch & Hallanan, Elmer H. Dodson and Stanley E. Deutsch, its attorneys, and presented to the Court its petition and exhibits, praying for a writ of prohibtion to be

directed against The Honorable Patrick Casey, Judge, Circuit Court of Kanawha County, as therein set forth. And came also Jack W. DeBolt, counsel for The Honorable Patrick Casey, Judge, Circuit Court of Kanawha County, and presented memorandum in opposition to granting the writ of prohibition. Upon consideration whereof a majority of the Court is of opinion that a rule should not be awarded and the prayer of the petition is therefore denied. Justice Neely would grant.

A True Copy

Attest: /s/ George W. Singleton
Clerk Supreme Court of
Appeals of West Virginia

APPENDIX C

WEST VIRGINIA RULES OF CIVIL PROCEDURE

RULE 5. Service and filing of pleadings and other papers.

. . .

(a) Service: When required. -- Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. No

service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

. . .

APPENDIX D

WEST VIRGINIA RULES OF CIVIL PROCEDURE

Rule 60. Relief from judgment or order.

. . .

(b) Mistakes; inadvertence; excusable neglect; unavoidable cause; newly discovered evidence; fraud, etc. -- On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, excusable neglect, or unavoidable cause; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic),

misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisified, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), (3), and (6) not more than eight months after the judgment order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to

relieve a party from a judgment, order or proceeding, or to grant statutory relief in the same action to a defendant not served with a summons in that action, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, petitions for rehearng, bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Supreme Court, U.S.
FILED
MAR 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1376

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1985.

GLASGOW, INC.,

Petitioner,

v.

STEPHEN S. NOETZEL and
MARILYN B. NOETZEL, his wife,

Respondents.

On Petition for a Writ of Certiorari
To the Supreme Court of Pennsylvania.

REPLY BRIEF.

Edward W. Mullinix,
Suite 3600, 1600 Market Street,
Philadelphia, Pennsylvania 19103,
Attorney for petitioner.

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To the Supreme Court of Pennsylvania.

REPLY BRIEF.

Respondents in their brief in opposition do not even pretend to deny the outrageous conduct that deprived Glasgow of any opportunity to defend on the merits.

On the contrary, respondents have devoted almost all of their brief in opposition to issues that Glasgow has not raised in this Court. For example, they boldly declare that "Glasgow's assertion . . . that it did not receive actual notice is false" (p. 5). Whatever factual issue there might be about notice to Glasgow of the West Virginia suit would hardly be an issue for this Court, but the fact is that undisputed testimony presented to the Pennsylvania courts establishes that Glasgow did not receive actual notice.

The primary issue we ask this Court to review is whether the undenied procedural manipulation that occurred in West Virginia amounted to a violation of procedural due process when the West Virginia courts refused to entertain

Glasgow's claim of mistake. On that issue, respondents have offered nothing.

The second issue is whether res judicata barred Glasgow from raising the due process question in Pennsylvania. On that issue, respondents make one new point, the decision of the United States District Court for the Southern District of West Virginia in the case in which Glasgow did present the federal due process question. What respondents fail to recognize is that the district court's basic decision in that case was that it was without jurisdiction [Glasgow, Inc. v. Noetzel, 556 F. Supp. 595, 597-598 (S.D.W.Va. 1983)]. It is well established that a court's determination of an issue is not conclusive in a later action if the determination was not essential to the court's judgment or if it was an al-

ternative determination. Restatement (Second) of Judgments § 27 and comment i (1982).

Respectfully submitted,

Edward W. Mullinix,
Suite 3600, 1600 Market Street,
Philadelphia, Pennsylvania 19103,
Attorney for petitioner.

March 19, 1986.